CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 75

THE COMMERCIAL CASUALTY INSURANCE COMPANY

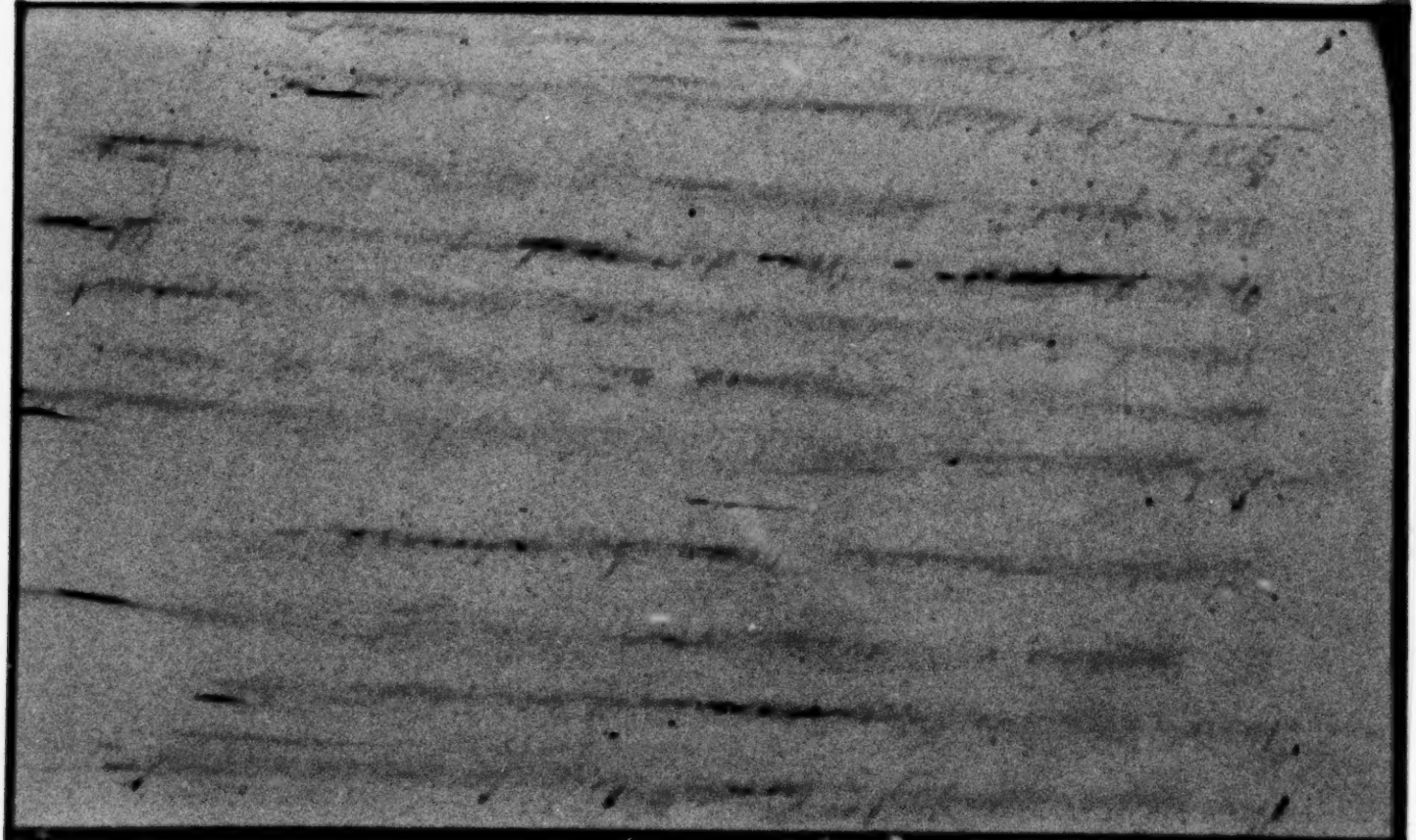
vs.

THE CONSOLIDATED STONE COMPANY

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED FEBRUARY 23, 1928

(33,248)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 14, 1928

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 4846

THE COMMERCIAL CASUALTY INSURANCE COMPANY, Plaintiff in Error,

v.

THE CONSOLIDATED STONE COMPANY, Defendant in Error

Error to the District Court, Northern District of Ohio, Eastern Division

Certified January 9, 1928

Before Denison, Moorman, and Knappen, Circuit Judges

STATEMENT OF CASE

Per CURIAM:

The Stone Company brought suit in the United States District Court for the Northern District of Ohio, alleging that it was a corporation organized under the laws of Indiana, and that defendant, the Insurance Co., was a corporation which was organized under the laws of the State of New Jersey, and "has qualified to and does conduct a general insurance and surety business within the State of Ohio and within this District." The Ohio laws which interpret this phrase "has qualified" are noted in the margin.[1] The summons was duly served within the district upon defendant's process agent whom it had appointed, as the law for qualifying required, to receive service of process in local suits against it. Through oversight, the summons, forwarded to the home office in New Jersey, was neglected and no counsel were employed to defend. A default judgment [fol. 2] was duly entered. As soon as this came to the

[1] Sec. 179, Page and Adams' General Code: "Before granting such certificate the Secretary of State shall require such foreign corporation to file in his office * * * a statement * * * setting forth * * * the name of a person designated as provided by law upon whom process against the corporation may be served within this state."

notice of defendant, and within the term, it entered a motion to vacate, for lack of the personal jurisdiction required by Sec. 41, of the Judicial Code,—since neither party resided in the district. The District Court denied that motion, and this writ of error is brought to review that denial.

Defendant later made a second motion to vacate, based on its excuses for having overlooked the summons. This motion appealed to the court's discretion; it also was denied; this latter ruling is not here involved.

Familiar cases say that this defect in the jurisdiction pertains to the venue, and defendant may either insist upon it or may waive it. In this case there was neither affirmative insistence nor affirmative waiver. Defendant allowed the time for effective objection to expire and did nothing.

Upon these facts, we respectfully certify to the Supreme Court for our instruction, these alternative questions:

Questions Certified

1. In a suit where it appears by the declaration that jurisdiction depends on diverse citizenship, and that the parties are respectively citizens of different states, but that the suit is brought in a district where neither party resides, and where defendant, duly served within the district, makes no objection but suffers a default judgment, should that judgment be vacated when, within the term, defendant moves therefor?

Or, if the Supreme Court shall think that the question should be more particular, then—

2. Should the judgment be vacated if, to the situation stated in question 1, it is added that the record shows that defendant was a foreign corporation and, in order to be allowed to do business in the state including this district, had consented that "process against the corporation may be served within this state"?

A. C. Denison, Chas. H. Moorman, L. E. Knappen,
Judges of the Circuit Court of Appeals, Sixth Circuit.

[fol. 3] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, Arthur B. Mussman, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of The Commercial Casualty Insurance Company, Plaintiff in Error, vs. The Consolidated Stone Company, Defendant in Error, No. 4846, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 7th day of February, A. D. 1928.

Arthur B. Mussman, Clerk of United States Circuit Court of Appeals for the Sixth Circuit. (Seal United States Circuit Court of Appeals, Sixth Circuit.)

Endorsed on cover: File No. 33,248. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 75. The Commercial Casualty Insurance Company vs. The Consolidated Stone Company. (Certificate.) Filed Feb. 23d, 1928. File No. 33,248.

No. .....

OCT 8
CHARLES ELMO

In the Supreme Court of the United States

No. 75.

October Term 1928.

Commercial Casualty Insurance Company,
Plaintiff in Error,

vs.

The Consolidated Stone Co.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Reed H. Davis,
Paul Lamb,
Attorneys for Plaintiff in Error.

...vis, Young & Vrooman,
Of Counsel.

No.

In the Supreme Court of the United States

COMMERCIAL CASUALTY INSURANCE COMPANY,

Plaintiff in Error,

vs.

THE CONSOLIDATED STONE CO.,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

REES H. DAVIS,
PAUL LAMB,
Attorneys for Plaintiff in Error.

DAVIS, YOUNG & VROOMAN,
Of Counsel.

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No.

In the Supreme Court of the United States

COMMERCIAL CASUALTY INSURANCE COMPANY,
Plaintiff in Error,

vs.

THE CONSOLIDATED STONE CO.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

FACTS.

This case was certified to the Supreme Court of the United States by the United States Circuit Court of Appeals for the Sixth Circuit upon two alternative questions:

1. In a suit where it appears by the declaration that jurisdiction depends on diverse citizenship, and that the parties are respectively citizens of different states, but that the suit is brought in a district where neither party resides, and where defendant, duly served within the district, makes no objection but suffers a default judgment, should that judgment be vacated when, within the term, defendant moves therefor?

Or, if the Supreme Court shall think that the question should be more particular, then—

2. Should the judgment be vacated if, to the situation stated in question 1, it is added that the record shows that defendant was a foreign corporation and, in order to be allowed to do business in the state including this district, had consented that "process against the corporation may be served within this state"?

For convenience we will refer to the parties as they stood in the trial court.

LAW.

A long line of decisions definitely establishes that in cases in which the sole ground of federal jurisdiction is that of diversity of citizenship, the question of the district in which the action shall be brought pertains to the venue; and the defendant may either insist upon it or waive it.

That if suit is brought in a district in which neither the plaintiff nor the defendant reside, the defendant may object to the jurisdiction of the court and the court must sustain the objection and dismiss the case. But if the defendant answers to the merits without first objecting, he waives his right to question the jurisdiction of the court.

Ex parte Schollenberger, 96 U. S. 369;

St. Louis and San Francisco Railway Co. vs. McBride, 141 U. S. 127;

Shaw vs. Quincy Mining Co., 145 U. S. 444;

The Southern Pacific Railway Co. vs. Denton, 146 U. S. 202;

Lee vs. The Chesapeake & Ohio Railway Co., 260 U. S. 653;

The Seaboard Rice Milling Co. vs. Chicago, Rock Island & Pacific Railway Company, 270 U. S. 363.

Beyond this point there are no decisions to guide us in the determination of the question involved in this case. We have found none that is directly in point, or even closely analogous, although we have found a few which throw some light upon the principles involved.

United States vs. Loughrey, 43 Fed. 449:

"Syl. Acceptance of service being merely equivalent to personal service in the district does not pre-

vent a defendant from moving to dismiss the suit because brought in a district in which he does not reside."

On page 449, the Court says:

"*The waiver, to be binding, ought to be clearly manifested*, and the Court ought not to hold the defendant for trial here upon a strained construction of the action and conduct of the parties."

Smellie vs. Southern Pacific Co., 197 Fed. 641:

"Syl. 1. While the objection of want of jurisdiction of a controversy by a Federal Court can not be waived, the right to have the action brought in a particular district may and will be waived unless timely objection is made; *but unless the acts of the parties are such as to evidence a waiver of the objection by both, no jurisdiction obtains, if the action is brought in the wrong district.*"

Pacific Mutual Life Insurance Co. vs. Tompkins, 41 C. C. A. 488:

"Syl. 2. The objection that an action is brought in a district in which neither the plaintiff nor the defendant resides is not waived by a defendant by attending at the taking of depositions by plaintiff before the issues are made up, nor by failing to file a plea in abatement."

Page 490, the Court says:

"At the time these depositions were taken, the declaration, on its face, stated that the action brought in the District Court of West Virginia was brought by a citizen and resident of the State of Virginia against a citizen and resident of the State of California. This of itself showed that the Court had no jurisdiction. 'Where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of the plaintiff or the defendant.' *No plea was necessary, as without amendment, the Court sua motu would have dismissed the suit.*"

The first two cases cited apply the general principles of waiver to which we will later refer at more length and hold that the waiver to be binding should be clearly manifested.

The last case, that of the Circuit Court of Appeals, states flatly that where the defect appears on the face of the pleadings the Court should of its own motion dismiss the case. These cases further decide what in particular instances are not waivers of the defendant's right to object to the jurisdiction of the Court, but do not go beyond the circumstances of the case then before the Court.

Thus the sole question in this case is whether the entering of a default judgment in the case constituted a waiver of the defendant's right to object to the jurisdiction of the Court. There are no decisions upon that question, and we must consider it upon the general principles applicable to the doctrine of waiver. As text books and decisions are in agreement on the definition of "waiver," we will not burden the Court with numerous citations. The definition given in *Ruling Case Law* is substantially the definition found in all of the texts and in all of the decisions. It is,

> "According to the generally accepted definition, a waiver is the intentional relinquishment of a known right." (27 *R. C. L.* 904)

And the same work states the generally accepted principle underlying the doctrine as follows:

Page 909:

> "A waiver may be express or implied, but in the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. To make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such

a purpose, or acts amounting to an estoppel on his part."

Without multiplying authorities, we will cite the following to the Court to show that the foregoing definition and statement of principles have received the approval of the Ohio Supreme Court and the Federal Courts.

The List & Son Co. vs. Chase, 80 O. S. 42, page 49:

"A waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak."

Page 51:

"The reason which underlies this proposition is that a waiver must be voluntary, that is intentional, with knowledge of the facts and of the party's rights, or it must be implied from conduct which amounts to estoppel."

United Firemen's Insurance Co. vs. Thomas, 82 Fed. 406.

Page 408:

"A waiver is an intentional relinquishment of a known right, an election by one to dispense with something of value, or to forego some advantage he might have taken or insisted upon. *Warren vs. Crane*, 50 Michigan 301. Mr. Bishop thus defines the term:

'Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it, thereupon he is said to have waived it and he is precluded from claiming anything by reason of it afterward.'"

Insurance Co. vs. Wolf, 95 U. S. 326, page 333:

> "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions."

Thus, in this case, it is only necessary to apply those principles to the admitted facts. In this case, as the United States Circuit Court of Appeals stated in its Certificate, there has been no express waiver. Thus the only possible theory of waiver in this case would be that of implied waiver. To establish this, there must be shown conduct relied upon by the plaintiff which has misled it to its prejudice.

In this connection it seems to counsel that the statement of facts in the Certificate of the United States Circuit Court of Appeals omitted one important fact. The record in this case discloses that on February 1, 1926, this case was filed in the United States District Court for the Northern District of Ohio. That on February 2, 1926, the plaintiff herein filed suit against the defendant herein on the same cause of action in the Court of Common Pleas of Mahoning County, Ohio; that in the latter case, service was had upon the defendant and that case is still pending in the State Court.

Thus the plaintiff herein, in addition to this suit, and at the same time, filed suit in the State Court, the only Court in Ohio in which it could maintain the action without the consent of the defendant. Thus the default in this case has not caused the plaintiff to sleep on any of its rights and did not cause it to prejudice its position; as plaintiff maintained the suit in the State Court even

after judgment had been rendered in the United States Court. The plaintiff then still has all of the rights it had when the action was started.

Nor was there in this case any time element which adversely affected the plaintiff. The default judgment was entered on May 28, 1926, and on June 21, 1926, the plaintiff in error filed its motion to vacate the default judgment and dismiss the action.

We have then in this case, the following circumstances shown by the record.

First: The suffering of the default to be taken was, in fact, unintentional upon the part of the defendant and was due solely to confusion in the Home Office of the defendant company resultant from the plaintiff suing the defendant on the same cause of action in two different courts at the same time.

Second: The position of the plaintiff was not in any way changed by the default judgment as even after the entering of that judgment, plaintiff continued to maintain its suit on the same cause of action against the defendant in the State Court. That action is still pending.

Third: There is no lapse of time intervening which would work to the prejudice of the plaintiff. The default was entered on May 28, 1926; the motion to vacate was filed on June 21, 1926, during the same term of Court.

There is not in the record of this case, one element which would permit of the application of the doctrine of implied waiver.

A little further inquiry would disclose the extent to which the principle of implied waiver would have to be extended to hold the defendant in this case. It will be conceded at once that if the defendant herein had come into Court at any time prior to the actual entering of the judg-

ment and had objected to the jurisdiction of the Court, the Court would have dismissed the action. If this be true, the only thing which could be deemed as conferring jurisdiction on the Court is the entering of the judgment itself. In other words, the Court by its own act of entering of judgment, confers on itself a jurisdiction over the person of the defendant which it did not have at any prior time. Obviously this is arguing in a circle. If the Court did not have jurisdiction of the person of the defendant prior to the time of rendering the judgment, the judgment itself would be a nullity and could not confer such jurisdiction.

In this connection the language of the Court in the case of *Harris vs. Hardeman*, 55 U. S. 334, although not dealing with the question here involved, is pertinent:

Page 339:

> "In reference to the first inquiry, it would seem to be a legal truism, too palpable to be elucidated by argument, that no person can be bound by a judgment, or any proceeding conducive thereto, to which he never was party or privy; *that no person can be in default with respect to that which it never was incumbent upon him to fulfill.* The court entering such judgment by default could have no such jurisdiction over the person as to render such personal judgment, unless, by summons, or other process, the person was legally before it."

It, also, seems to counsel that a decision of the Ohio Supreme Court, although not directly in point, is analogous in principle.

In *Haley vs. Hanna, et al.*, 93 O. S. 49, the Court speaks as follows:

Pages 51 and 52:

> "In determining whether or not the court of appeals was correct in its conclusions of law on the motion to vacate, we are bound by the conclusions of

fact presented by the record. The court found specifically that Tim Haley was not served with summons. While the pleadings on their face purported to be the pleadings of all the defendants, including Tim Haley, it appears affirmatively that he did not authorize anyone to enter his appearance. He had knowledge of the pendency of the action and the issue and return of service regular on its face and of the proceedings had. It further appears that he did not advise the court or the opposite party of the defective service upon him, and did not protest or object to the entering by others of his appearance in the case.

We are of the opinion that the court of appeals erred in its conclusions of law. We cannot agree with the holding that it was the duty of Tim Haley to advise the court or the opposite party before judgment of the defective service, and that, having failed to do so, his omission constituted a waiver of the original defective service. Haley was not brought into court by a summons and no one had authority to enter his appearance or act for him. He had knowledge of the proceedings in court, it is true, but we do not see upon what theory the duty devolved upon him to advise the court or the parties to the proceeding of the defective service. The judgment rendered against him was of no force or effect and the court of appeals erred in refusing to vacate the same."

If then, we do not accept the theory that the action of the Court, itself, in entering a default judgment against the defendant was the sole thing that constituted a waiver of the defendant's right to object to the jurisdiction of the Court, we are back again to the proposition that jurisdiction in this case must be determined by the application of the general principles of waiver. There having been no express waiver as the United States Circuit Court of Appeals found and no implied waiver for the reason that nothing was said or done by the defendant (so that no word or action of the defendant could mislead the plaintiff and

no rights of the plaintiff were prejudicially affected), the Court should hold that the Trial Court did not have jurisdiction of the person of the defendant at the time the default judgment was entered.

In regard to the second question certified by the United States Circuit Court of Appeals, it appears that the additional facts set forth in Question No. Two, do not alter the question here involved, in any way. It has been established by a long line of decisions of the United States Supreme Court, that a corporation is a resident only of the state which creates it. And the fact that it has appointed agents upon whom service of summons may be had in states other than the state of its residence, does not prevent it from objecting to the jurisdiction of the Federal Court in cases brought in a district in which neither it nor the plaintiff resides, but in which it may have an agent upon whom service of process may be made.

Shaw vs. Quincy Mining Co., 145 U. S. 444:

"Syl. 1. Under the Act of March 3, 1887, as corrected by the Act of August 13, 1888, a corporation incorporated in one State of the Union, and having a usual place of business in another State in which it has not been incorporated, cannot be sued, in a Circuit Court of the United States held in the latter State, by a citizen of a different State."

Page 449:

"As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, re-

stricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident.

In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the State and district in which it has been incorporated, or in the State of which the other party is a citizen."

Southern Pacific Company vs. Denton, 146 U. S. 202; Page 206:

"The case at bar is not affected by either of the statutes of Texas on which the counsel for the defendant in error relies.

He contends that the plaintiff in error had consented to be sued in the Western District of Texas by doing business and appointing an agent there under the statute of Texas of 1887, c. 128, requiring a foreign corporation, desiring to transact business in the State, 'to file with the Secretary of State a certified copy of its articles of incorporation, duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this State engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this State, said application to contain a stipulation that said permit shall be subject to each of the provisions of this act,' one of which was that any foreign corporation sued in a court of the State, which should remove the case into a court of the United States held within the State, 'for the cause that such corporation is a non-resident

of this State or a resident of another State from that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or granted to such corporation to transact business in this State.' General Laws of Texas of 1887, pp. 116, 117.

But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions. *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burnside*, 121 U. S. 186; *Texas Land Co. v. Worsham*, 76 Texas, 556. *Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the State. It did not undertake to declare the corporation to be a citizen of the State, nor to accept by the vain attempt to prevent removals into the national courts to alter the jurisdiction of any court as defined by law.* The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the State. *Lafayette Ins. Co. v. French*, 18 How. 404. It might likewise have subjected the corporation to the jurisdiction of a Circuit Court of the United States held within the state—so long as the Judiciary Acts of the United States allowed it to be sued in the district in which it was found. *Ex parte Schollenberger*, 96 U. S. 369; *New England Ins. Co. v. Woodworth*, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488. *But such an agreement could not, since Congress (as held in Shaw v. Quincy Mining Co. above cited) has made citizenship of the State, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up non-compliance with that test, when sued in a Circuit Court of the United States.*"

Galveston, Harrisburg and San Antonio Railway Company vs. Gonzales, 151 U. S. 496:

"Syl. 1. A domestic corporation, incorporated under the laws of Texas, a State divided into more than one Federal district, is, under the State law, and the Federal laws as to the bringing of suits and actions in Federal courts, a citizen and inhabitant of that district in the State within which the general business of the corporation is done, and where it has its headquarters and general offices."

In re Keasbey and Mattison Company, 160 U. S. 221:

"By virtue of the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, a corporation incorporated by a State of the Union cannot be compelled to answer to a suit for infringement of a trade-mark under the act of March 3, 1881, c. 138, in a district in which it is not incorporated and of which the plaintiff is not an inhabitant, although it does business and has a general agent in that district."

Page 229:

"When the parties are citizens of different States, so that the case comes within the general grant of jurisdiction in the first part of the section, the defendant, by entering a general appearance in a suit brought against him in a district of which he is not an inhabitant, waives the right to object that it is brought in the wrong district. *Interior Construction Co. v. Gibney, ante*, 217, and cases there cited. But a corporation, by doing business or appointing a general agent in a district other than that in which it is created, does not waive its right, if seasonably availed of, to insist that the suit should have been brought in the latter district. *Shaw v. Quincy Mining Co.* and *Southern Pacific Co. v. Denton*, above cited."

Seaboard Rice Milling Company vs. Chicago, Rock Island & Pacific Railway Company, 270 U. S. 353:

"Syl. 2. A corporation (within the meaning of the jurisdictional statutes) is a resident of the State in which it is incorporated, and not a resident or inhabitant of any other State—even of one within which it is engaged in business. p. 356."

Thus we submit that the additional facts set forth in the second question do not affect the question involved in this case. The fact that the corporation has appointed an agent for process and agreed that process may be served within the state raises no different question than if proper service were had upon the corporation in the district without its agreement to accept process within the state.

Thus the question, as we have previously pointed out, must be answered by the application of the general principles applicable to the doctrine of waiver. We submit that under the facts in this case, there is no express waiver and no grounds upon which an implied waiver could be predicated.

In closing, we would call the Court's attention to the fact that Section 51 of the Judicial Code has been before this Court frequently, and that each time the Court has used language similar to that used in the *Keasbey* case, to-wit:

That a "corporation cannot be compelled to answer in a Circuit Court of the United States held in another state" and "the suit must be brought in the residence of the plaintiff or the defendant." The implication from this language clearly is that the suit must be brought in the district provided by statute unless the defendant consents to other jurisdiction or unless he, by the positive act of pleading to the merits, waives his right to object. And that to hold that the defendant had waived his rights in this case would

be going far beyond any application of the doctrine of waiver which any Court has yet made.

In holding the defendant in this case, the Court would be working a great hardship upon it. The defendant would be deprived of its day in Court due to an oversight which was resultant from confusion caused by the actions of the plaintiff in filing two suits on the same cause of action in two different courts at the same time. Such a decision would work a hardship in numerous cases by a great extension of the doctrine of waiver, in holding that failure to act when there was no clear obligation to act would be a waiver of rights.

On the other hands, such a decision of this case would work no hardship on the plaintiff. The plaintiff never had the right to have its case heard in the Court in which it was brought. This was known to the plaintiff, and that the plaintiff did not expect to be able to maintain the case is evidenced by its filing suit in the State Court at the same time this case was filed which suit is still pending and can be tried as soon as this case is dismissed.

And, finally, dismissal of this case would tend to clear this question of venue which is so frequently coming up; and would tend to deter plaintiffs from starting actions in districts in which they know they can not be maintained.

Respectfully submitted,

REES H. DAVIS,
PAUL LAMB,

Attorneys for Plaintiff in Error.

DAVIS, YOUNG & VREELAND,

Of Counsel.

[redacted]

In the Supreme Court of the United States

[redacted]

[redacted]

[redacted]

In the Supreme Court of the United States

No. 75.

October Term, 1928.

Commercial Casualty Insurance Company,

Plaintiff in Error,

vs.

The Consolidated Stone Company,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Union C. DeFord,
Norman A. Emery,
Attorneys for Defendant in Error.

Harrington, DeFord, Huxley and Smith,
Of Counsel.

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In the Supreme Court of the United States

No. 75.

October Term, 1928.

Commercial Casualty Insurance Company,
Plaintiff in Error,

vs.

The Consolidated Stone Company,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Preserving the original designation of the parties, The Consolidated Stone Company, on the first day of February, 1926, filed its petition in the United States District Court at Cleveland, Ohio, against the Commercial Casualty Insurance Company. In this petition it is averred that the plaintiff corporation is incorporated under the laws of the State of Indiana, and that the defendant, Commercial Casualty Insurance Company, is incorporated under the laws of the State of New Jersey; that such defendant corporation qualified to and did conduct a general insurance and surety business within the State of Ohio; that the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

No answer or other pleading was filed to that petition by the defendant, but the defendant did under date of February 3rd, 1926, address a letter to counsel for the plaintiff wherein receipt of the summons from the United States

District Court was acknowledged and requested to be advised the name of the person to whom the material was furnished and for what contract the material was used. On February 5th, 1926, counsel for THE CONSOLIDATED STONE COMPANY replied to that letter, advising them that the material was used for construction work in connection with a parochial school at Monessen, Pennsylvania, and that the Moore-Lamb Construction Company of Youngstown, Ohio, had the contract for the erection of those buildings.

In due time the case was placed upon the assignment of cases to be tried at Youngstown, Ohio, and was called for trial when reached. There being no answer in the case or no appearance, Honorable Paul J. Jones passed the case on his own motion to the heel of the Youngstown assignment and on May 28th, 1926, that being the last day of the Youngstown Session of the District Court it was again called for trial, on which date a default judgment was entered in favor of the plaintiff in the amount of SIX THOUSAND TWENTY-FIVE and 20/100 DOLLARS ($6025.20).

On June 21st, 1926, the defendant filed a motion in that court requesting the court to **vacate** the default judgment and to **dismiss** the suit upon the ground that the court was without jurisdiction as required by Section 51 of the Judicial Code. On August 24, 1926, the motion to vacate and dismiss was overruled and thereafter on September 11, 1926, the defendant filed a new motion again requesting the court to vacate the default judgment and permit it to file an answer setting up a so-called meritorious defense. On November 10, 1926, Judge Jones overruled the second motion to vacate and refused the request of the defendant to be permitted to file its answer setting up the so-called meritorious defense. The case was then taken by writ of error to the United States Circuit Court of Appeals for the Sixth Circuit and argued by counsel upon a date set by

that court. Thereafter, the Judges of the United States Circuit Court of Appeals certified two questions to this Court based on a statement of facts found by that court.

It is an admitted fact and so found by the United States Circuit Court of Appeals that the defendant, being a foreign corporation had qualified under the statutes of the State of Ohio to do business therein and had in conformity with the requirements of the statutes of that state designated an agent upon whom service of process might be had in causes of action filed in courts within that state. Service of process in this action was made upon the designated agent and the validity of that service is not questioned.

QUESTIONS CERTIFIED

The United States Circuit Court of Appeals find the following facts: The plaintiff brought suit in the United States District Court for the Northern District of Ohio; that it was a corporation organized under the laws of Indiana and the defendant was a corporation organized under the laws of the State of New Jersey; that defendant had qualified to and did conduct general insurance and surety business within the State of Ohio and within the district where the action was filed; that the summons was duly served within the district upon the defendant's process agent designated by it as required by the statutes which permitted it to do business in said state; that the summons served on such agent was forwarded to the home office of the company in New Jersey and through neglect no counsel was employed to defend; that a default judgment was thereafter entered and when such judgment was called to the attention of the defendant, it entered a motion to vacate for lack of personal jurisdiction; that motion as well as a later motion to vacate were overruled;

that the second motion to vacate was addressed to the trial court's discretion and the ruling upon that motion is not involved in the proceedings before the United States Circuit Court of Appeals; that the question raised by the first motion is one which pertains to venue and is a right which the defendant may either insist upon or may waive; that in the particular case defendant allowed the time for effective objection to expire.

That upon these facts the following alternative questions are respectfully certified to this Court:

1. In a suit where it appears by the declaration that jurisdiction depends upon diverse citizenship, and that the parties are respectively citizens of different states, but that the suit is brought in a district where neither party resides, and where the defendant, duly served within the district, makes no objection but suffers a default judgment, should that judgment be vacated when, within the term, defendant moves therefor?

Or, if the Supreme Court shall think that the question should be more particular, then—

2. Should the judgment be vacated if, to the situation stated in Question 1, it is added that the record shows that defendant was a foreign corporation and, in order to be allowed to do business in the state including this district, had consented that process against the corporation may be served within this state?

COMMENT ON BRIEF OF PLAINTIFF IN ERROR

On page 6, counsel state,

"Thus the sole question in this case is whether the entering of a default judgment in the case constituted a waiver of the defendant's right to object to the jurisdiction of this court."

We do not understand this to be an accurate statement of the issue or issues before this Court. The United States Circuit Court of Appeals has definitely found that the time for effective objection in this case had expired. Strictly speaking, we are not concerned with a question which affects the general jurisdiction of the United States District Court, but one which questions only the right of the defendant to be sued in a particular court. If the question here went to the general jurisdiction of the court, then the statement of opposing counsel would be correct. But where it concerns venue only the statement in the brief is very far from being accurate.

Again, on page 7, counsel say,

> "It will be conceded at once that if the defendant herein had come into the court at any time prior to the actual entering of the judgment and objected to the jurisdiction of the court, the court would have dismissed the action."

This again we think is an inaccurate statement of the question before the United States Circuit Court of Appeals and the one to be decided by this Court. It would be a correct statement even after judgment had been entered if the general jurisdiction of the United States District Courts was in question. As before stated, the general jurisdiction of the United States District Courts is not herein questioned.

Again, on page 8, counsel say,

> "If the court did not have jurisdiction of the person of the defendant prior to the time of rendering judgment, then judgment itself would be a nullity and could not confer jurisdiction."

This statement we also think is inaccurate when applied to the undisputed facts in this case. The United States Circuit Court of Appeals found that the District Court in

which the petition was filed did have jurisdiction of the cause of action and jurisdiction of the person of the defendant but it was such jurisdiction that might have been defeated had the defendant by **proper** and **seasonable** objection asserted its right of being sued only in a particular district as provided in Section 51 of the Judicial Code, now Section 112 of Title 28, U. S. C. A. In this connection, it is to be noted that the United States Circuit Court of Appeals has found that the defendant allowed the time for effective objection to expire. Counsel do not cite any case which by analogy or otherwise holds that the finding of the United States Circuit Court of Appeals in this respect is contrary to law.

LAW AND ARGUMENT

The right to question the jurisdiction of a court, strictly speaking, is never lost or waived and we are not making any attempt to change the rule that the jurisdiction of any court may be questioned at any time during the trial, after judgment or even in a reviewing court, but that rule applies only when the general jurisdiction of a court over an action is drawn in question. That rule has no application in this case. Here the petition shows upon its face that the plaintiff and the defendant are corporations of different states, which is sufficient to give the national courts jurisdiction under the acts of Congress affecting the general jurisdiction of Federal Courts.

The defendant in this case undoubtedly had a right under Section 51 of the Judicial Code, now Section 112 of Title 28, U. S. C. A., to insist that it be sued only in one of two jurisdictions. It was subject to suit under the general jurisdictional acts in any state in the United States where valid service might be had, but another Section of the same Act limited that right where the jurisdiction de-

pended upon diverse citizenship alone to one of two particular jurisdictions, that is, the jurisdiction in which the plaintiff or the defendant was a resident. Such right is held by a long line of authorities, some of which are cited in the brief filed by the defendant, to be a personal privilege which may be either asserted or waived. It can only be asserted according to these authorities by prompt objection to being sued in that particular Court and if not objected to promptly and seasonably it loses the right to thereafter claim or assert such privilege. We claim in this case that the defendant by failure to assert its right or claim its privilege within a reasonable time by not objecting to the maintenance of said suit in the district where it was filed has lost its right to thereafter claim or assert such privilege.

The cause of action was filed in the United States District Court at Cleveland, Ohio, on February 1st, 1926, and service of process made upon the designated agent of the defendant on the same day. The time within which the defendant is required to plead or answer is controlled in Ohio by statute and the provisions of that statute are followed in the United States District Court. Section 11283 of the General Code of Ohio insofar as applicable here provides:

> "When the time for bringing parties into courts is not fixed by statute, the summons shall be returned on the second Monday after its date."

The Ohio statutes further require that a person served with summons shall answer or demur to the petition thus filed on or before the third Saturday after the return date of said summons. Section 11346 of the General Code of Ohio insofar as applicable here is as follows:

> "The answer or the demurrer to the petition shall be filed on or before the third Saturday * * * after the return day of the summons or service by publication * * *."

So that in this case the first day of February, 1926, being Monday, the summons was returnable on the 15th day of that month and the answer or demurrer of the defendant should have been filed on or before March 6th, 1926. No action of any kind was taken by the defendant and on May 28th, 1926, a default judgment was entered by the court, so that when the default judgment was entered the defendant was in default for answer or other pleading for a period of almost ninety days and the defendant had at that time lost its right to assert its privilege of being sued only in a particular jurisdiction. This is the holding in the case of

> *Mannion vs. United States Shipping Board Emergency Fleet Corporation, et al.*, 9 Federal Reporter, Second Series, 894.

At page 895, the United States Circuit Court of Appeals for the Second Circuit through Judge Hand says:

> "The defect on which the defendants rely was only one of venue and as such might be waived. * * * Hence, if the defendants, actually served, waived the defect by consent, or in any other way, the court, having substantive jurisdiction over the cause, might proceed. Section 278 of the Civil Practice Act of New York provides that, where the complaint shows a defect of jurisdiction curable by the defendant's consent, it will be waived unless taken by motion, and Rule 106 of the Supreme Court of that state provides that it must be taken by a motion within twenty days. * * * Nevertheless, this is a case, we think, in which the state practice should control. There is no reason why a person actually served and aware of a defect of venue, should be allowed more than twenty days within which to object. The point is one formerly taken by special demurrer, which was dilatory in character and for the convenience of the defendant. It was always susceptible of waiver **through inaction**."

Applying the principle of this decision to this case, the defendant through inaction waived its right to assert or claim its privilege when it did not plead or answer as required by the statutes of the State of Ohio.

In the case of

Great Lakes and St. Lawrence Transportation Company vs. Scranton Coal Company, 239 Federal 603,

the United States Circuit Court of Appeals for the Seventh Circuit through Judge Mack at page 605 says:

> "While it is true that the time given under the rules for pleading enables a defendant carefully to examine the bill and fully to consider whether or not he shall waive this privilege, it does not follow that he may not be called upon for a decision at some earlier period; concededly, he may voluntarily waive the time period and enter a general appearance. And if, as in the instant case, the exigencies of the proceedings require prompt action by the parties and by the court long before the day for pleading, the defendant, in our judgment, is not absolved from forthwith either asserting his personal privilege or waiving it. Though this may at times result in the loss to a defendant of a statutory privilege, through **inadvertence** and without real negligence, we deem it but the logical application of the salutary principle underlying the rule requiring, as his first step in the litigation, a special appearance for this specific purpose in order to preserve the right, namely, that a party shall not attempt to win out on the merits and if unsuccessful or subsequently unwilling to risk a decision in that court, then be able to avert the consequences, for causes not absolutely fatal to the court's jurisdiction."

That means that if a person is to claim the statutory privilege he must, before anything else is done in the case, appear and assert his claim to that right. It also, it seems to us, means that having once asserted that right and there-

after entered a general appearance to contest the case on its merits, that the right once claimed by special appearance is waived by a subsequent general appearance.

An illustration of what might happen in this case will serve to show the reasonableness of such a rule. The defendant here after default judgment was entered appeared and at least undertook by special plea to raise the question of its statutory privilege. The court held that the plea came too late and overruled the motion. The defendant did not then elect to stand on the right thus asserted but waived that right when it filed a second motion requesting the court to vacate the default judgment and permit it to file an answer setting up a so-called meritorious defense. This second motion to vacate appealed to the discretion of the court and could not be considered by a reviewing court unless a gross abuse of that discretion was disclosed by the record. It was not such a final order that the plaintiff could have had it alone reviewed by either appeal or error. While the first motion which was overruled by the court, it seems to us is such a motion as could have been reviewed by appeal or on error and such appeal should have been taken had the defendant intended to stand on such a plea. If the second motion had been sustained by the court the plaintiff would have been required to try the issues thus made by the pleadings to a jury and if successful in obtaining a verdict from the jury would then be confronted with the proposition that the ruling of the trial court on the first motion might be called in question in the reviewing court and the whole trial and the result thereof declared a nullity and therefore void. This we do not think is either the spirit or the letter of the law. Many decisions of this and other courts discussing the question of venue say that the right to object to the jurisdiction of a particular court does not survive the entry of a general appearance. None of these cases at-

tempt to distinguish the effect of a general appearance made before or after the objection to the jurisdiction is raised and it is our contention here that the defendant waived its right to thereafter assert its privilege when it entered a general appearance in the case. This proposition will be discussed more at length in connection with authorities hereinafter cited. We think the delay on the part of the defendant in coming into court constituted a waiver as held in the case of

Pennsylvania Railroad Company vs. Swift and Company, 242 Federal 92.

At page 93, the court says:

"The right referred to being, however, as has been intimated, not an absolute right, in the sense in which we are now viewing it, but partaking also of the nature of a privilege, it is one which the parties concerned may assert in a demand for its recognition or may waive, and the real question in this case is whether or not the defendant has waived it. * * * It is not asserted that there has been any direct or formal waiver. If, however, the defendant has asserted any other right, or done any act, or made any move which necessarily involves or carries the necessary implication of waiver, he is deemed to have waived his privilege as fully as if he had formally done so. * * * Out of this has sprung the doctrine that the privilege of the defendant is one which must be **asserted promptly**, or cannot be asserted at all. This is based on the proposition that, if the plaintiff is to be put out of court, the right of the defendant to put him out cannot be so used as to unduly delay the plaintiff, or put him to any other disadvantage and if such is the result the privilege can not be asserted. * * * We reach the conclusion indicated through the finding that the waiver of privilege was by the delay of the defendant itself and not by the acts of counsel. * * * There is nothing in the case, however, to suggest that

the defendant did not know of the transactions out of which this controversy has arisen. It therefore knew it possessed the privilege of being sued in its home jurisdiction. It should therefore have instructed its counsel to assert that right. If this instruction had been given, the plaintiff would promptly have been put on notice, and the delay which has arisen would not have resulted. We cannot now allow the defendant its privilege without serious disadvantage to plaintiff, and find the defendant to have no right to assert a privilege which has been waived."

The case of

Mandel Bros. vs. Victory Belt Company, 15 Federal, Second Series, 610,

is in some respects analogous to this case. Summons in this case was returned on August 8th, 1925, and on October 1st that year defendant was defaulted and a final decree entered. On November 3rd, 1925, defendant petitioned the court to set aside the default upon the ground that the defendant had a meritorious defense. Motions were thereafter filed to quash the marshal's return on the summons and on January 28th, 1926, the motion to quash the marshal's return after arguments of counsel and due deliberation by the court was overruled and denied. On February 5th, 1926, without in any way seeking a review of the order denying the motion to quash, Mandel Bros., the defendant, filed a new petition asking the court to vacate the default decree, setting up in that motion facts sufficient to show that the summons did not come to the attention of counsel until two and one-half months after service. At page 611 the court says:

"Solely through defendant's fault, the subpoena did not come to counsel's hands until more than two and one-half months after its service, and counsel waited ten days longer, and three days after the term at which the decree was entered, before doing any-

thing. Counsel then told the court that the subpoena had been served upon defendant but had been mislaid, and, without in any way challenging the return asked to have the default set aside, so that the defendant could make a defense upon the merits. That was a general appearance which gave the court jurisdiction over the defendant. The petition was denied in the January, 1926, term and the order was not appealed from. * * * There was no appeal from the order made on January 28th denying that motion (the motion to quash service). We are of the opinion that that was an appealable order. In any event the appeal should have been from the order (motion to quash service) of January 28th, 1926."

In the *Mandel Bros.* case the motion to quash service raised the question of the right of the court to take jurisdiction of the person of the defendant and enter a default judgment therein. The motion to quash is a plea in abatement just as the objection to the jurisdiction is in the case under consideration, and the court holds that in order to rely upon such a plea an appeal must be taken from the order denying such a plea and that after a general appearance is made in the case without taking such an appeal to the reviewing court the right thereafter to insist on the plea in abatement has been lost or is waived.

In the cases thus far cited we have attempted to show that delay, inattention, carelessness or the failure to assert the statutory privilege drawn in question waives the right of the person or corporation guilty of such conduct to thereafter claim or assert such privilege. The cases about to be cited take up the question for decision from a somewhat different viewpoint and hold that you cannot claim or assert the privilege of being sued in a particular jurisdiction and also contest the controversy on its merits or ask other relief therein. The first case to which we wish to call this Court's attention was decided many, many

years ago but is very often referred to, cited with approval and followed. It is the case of

Abram Sheppard and John Duncan vs. Peyton S. Graves, 14 Howard 505, 14 Law Edition 518.

First syllabus:

> "It is a bad mode of pleading to unite pleas in abatement and pleas to the merits. And if after plea in abatement a defense be interposed, going to the merits of the controversy, the grounds alleged in abatement **become thereby immaterial and are waived.**"

At page 509, Mr. Justice Daniel in delivering the opinion of the court says:

> "Thus it has ever been received as a canon of pleading that matters which appertain solely to the jurisdiction of a court, or to the disability of the suitor, should never be blended with questions which enter essentially into the subject matter of the controversy; and that all defenses involving inquiries into that subject matter imply, nay admit, the competency of the parties to institute such inquiries, and the authority of the court to adjudicate upon them. Hence it is, that pleas to the jurisdiction or in abatement, are deemed inconsistent with those which appertain to the merits of a cause; they are tried upon different views as to the relations of the parties and result in different conclusions. * * * A practice, thus fraught with confusion and perplexity and one endangering the rights of suitors, it is exceedingly desirable should be reformed, and we are aware of no standard of reformation and improvement more safe or more convenient than that which is supplied by the time tested rules of common law. And by one of those rules, believed to be without an exception, it is ordained that objections to the jurisdiction of the court, or to the competency of the parties, are matters pleadable in abatement only, **and that if after such matters relied on, a defense be interposed in**

bar and going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial, and are waived."

In the case of

Louise D. Sobry vs. John Nicholson, 70 U. S. 420, 18 Law Edition 263,

Mr. Justice Swayne in delivering the opinion of the court says:

> "The objection to jurisdiction upon the ground of citizenship, in actions at law, can only be made by a plea in abatement. After the general issue, it is too late. It cannot be raised at the trial upon merits. * * * If a plea in abatement be filed with the general issue, the latter waives the former."

Lehigh Valley Coal Company vs. Yensavage, 218 Federal 547;

Application for writ of certiorari denied. 235 U. S. 705, 59 Law Edition 434.

The complaint filed in this action states that the plaintiff is a resident and citizen of the County of Kings and that the defendant is a resident and citizen of the State of Pennsylvania. Defendant denied the allegations of plaintiff's residence. On cross examination of the plaintiff it appeared that he was an alien and therefore the defendant asked that the complaint be dismissed on the ground that the court had no jurisdiction, the action being one brought by an alien in New York State against a resident of the State of Pennsylvania. The motion was denied and exception taken. At the close of plaintiff's case the defendant renewed its motion on the ground that the court was without jurisdiction. This motion was again denied and exception taken. The motion was again made at the close of all the testimony, again denied, and exception again taken. The jury returned a verdict in the sum of $37,500.00. By writ of error the case was brought to the

United States Circuit Court of Appeals for the Second Circuit and opinion announced on November 10th and November 30th, 1914. In the course of the opinion, page 549, the court says:

> "The real question, therefore, is whether the defendant has lost the point by appearance and pleading to the merits. As we have said, where the record requires proof of diversity of citizenship, it is enough that issue is taken on the allegations. * * * But we think that the rule is different where the objection goes only to the proper place of trial. Certainly, where the defect appears upon the face of the complaint a defendant waives the objection by appearing and pleading to the merits. Even though he tries especially to reserve the point by joining a demurrer to the court's jurisdiction over him personally. * * * Similarly, when, although the complaint on its face shows jurisdiction, the defendant has been served out of the place of his residence, he may not couple a demurrer to the court's jurisdiction over him personally with a plea to the merits."

And at page 550,

> "All we wish to lay down is that, when once the truth appears, then at least the defendant must choose between his plea in abatement and his plea to the merits. Assuming that it is not bad to couple the two positions before the defendant is informed, there can be no justification in allowing him to proceed thereafter in the alternative. The rule which forbids him to do this when advised from the outset must surely forbid him to continue with the same option after the option is once presented."

At page 551,

> "We therefore conclude that the decision of the District Court was correct upon the pleadings as they stood, and that as the defendant did not adopt the only allowable course, but continued to press his plea to the merits with his plea to the forum, he lost his

option. No doubt this is a somewhat rigid application of the rule but no more, we think, than is required by the two decisions upon which we rely. The plea is at best very technical, and in the case at bar has nothing upon the merits to commend it. A defendant may justly complain of being taken out of his domicile for the trial of a cause, but his right depends only upon his own convenience, and there is no reason why he should be allowed to reserve such a point while he continues to contest the actual merits of controversy, else we have what this case itself presents, **the expense of a trial and appeal, with corresponding delay, in the end all turning upon whether the defendant has been sued in the proper place.**"

This question came again to the attention of the United States Circuit Court of Appeals for the Second Circuit in the case of

Lehigh Valley Coal Company vs. Waddle, 231 Federal 42,

and was decided on February 15th, 1916. Insofar as this case is concerned, the latter opinion of the court does not change or modify the rule laid down in the *Fenwick* case. It modifies the rule announced in the *Fenwick* case, *supra*, only when the question arises during the actual trial of the case and holds in substance that if the jurisdictional question arises for the first time during the trial of the case and is decided against the defendant that the defendant should not lose the right to assign that ruling as error if required by the court to contest the case upon its merits. The reason for such a modification is apparent and without question such modification is reasonable and just, and at page 47 the court says:

> "The motion made by defendant in the case at bar is substantially the same as made in the *Fenwick* case; it asked for relief both on the technical ground and on the merits. * * * By asking for a decision on

the merits before determination of the jurisdictional question, defendant, under the Venuvage decision, practically waived, with knowledge, the technical objection."

Adler Goldman Commission Company vs. Williams, 211 Federal 532.

At page 532, District Judge Trieber says:

"But this question cannot be determined in this case now, as it has been authoritatively settled that when a party demurs, not only to the jurisdiction of the court, but also pleads to the merits of the bill, such a motion is equivalent to a general appearance, and waives, not only all defects in the service, but all special privileges of defendant in respect to the particular court in which the action is brought. As there is a diversity of citizenship, which gives some national court jurisdiction, this ground must be overruled."

Kerr vs. Philadelphia and Reading Coal and Iron Company, 224 Federal 914.

District Judge Butfield, at page 916 says:

"If there be no issue of fact, then the question of jurisdiction must necessarily be determined as a matter of law. Ruling on the question of law might be reserved, but it would seem that defendant could not and should not be allowed to stand upon its plea to the jurisdiction and also be allowed to contest the issue upon the merits, unless the court (as indicated in the *Waldo* case, *supra*) compelled the defendant to go on, so as to avoid a reversal trial."

From these authorities, it is apparent that the defendant waived its right to insist upon its plea in abatement after it had undertaken to obtain relief upon the merits and upon up and vacate the default judgment and file an answer setting up a meritorious defense. If this were not the rule, a situation far from desirable so far as parties litigant are concerned would necessarily develop. A plea

to the jurisdiction or to the disability of the plaintiff could be entered in many cases and that plea having been overruled, the defendant could except to such ruling, file the necessary answer and contest the case on its merits and if defeated on the merits then have the preliminary ruling reviewed and perhaps set aside by a reviewing court. Such is not the law as we read the cases and the true rule seems to be that if a party to a controversy desires to stand on the ground of technical privilege or disability of the party plaintiff to bring the action he must finally adjudicate that question before undertaking to obtain other relief in the controversy, and that if he without final adjudication on the question of privilege or disability contests the case on the merits he thereupon waives the right to thereafter raise such preliminary question.

A very recent decision by District Judge Slick has come to our attention. He reaches a conclusion based upon grounds other than those discussed in the cases hereinbefore cited. It is

Patten vs. Dodge Manufacturing Corporation, 23 Federal Second 852. Decided January 20, 1928.

At page 853, District Judge Slick says:

> "Defendant filed what it calls 'a motion to dismiss in the nature of a plea,' in which it challenges the jurisdiction of the court, for the reason that the bill discloses that the jurisdiction is dependent upon diversity of citizenship, and said plea alleges that defendant is not a citizen of Indiana, as set up in the bill, but is a corporation and citizen of the state of Delaware."

Again, at page 854,

> "Without undertaking to cite the numerous cases (federal and state) bearing upon the subject, we think we are safe in saying that it is now firmly settled that,

when a corporation created by the laws of one state voluntarily comes, by its officers or agents, within the jurisdiction of another state, and there engages in business, it becomes amenable to the process of the courts of the latter state, if the laws thereof make provision to that effect. In one of the cases (*Insurance Co. v. Duerson*, 28 Grat. (Va.) 630) it was declared by the Court of Appeals of Virginia that the corporation, for the purpose of being sued, is to be considered as having a domicile in the state where it has thus voluntarily located; and in the case of *Insurance Co. v. Woodworth*, 111 U. S. 138, 145, 147, 4 St. Ct. Rep. 364 (28 L. Ed. 379), the Supreme Court of the United States did distinctly hold that a company incorporated in one state, by doing business and having an agent upon whom service may be made in another state, may there acquire another domicile, so as to give locality there to a debt on a policy of insurance as the foundation of administration in the latter state. That the defendant corporation is suable in the courts of Pennsylvania, and that such service as we have in this case would be a good service in the courts of the state, is undeniable. * * * What good reason, then, is there for exempting the company from suit in a federal court sitting in Pennsylvania? Can it be supposed that such was the intention of Congress? Under previous laws a person was suable in any district in which he might be found. Although he might have been a mere sojourner in, or was simply passing through, the district, he was liable to be served therein with process from a federal court. This was the mischief which Congress intended to remedy by omitting from the act of 1887 the words 'or in which he shall be found.' But, clearly, under the provisions of the act of 1887, if a citizen of a state, without changing, or intending to change, his citizenship, becomes an inhabitant of another state, or, in other words, has his domicile or fixed residence therein, he is suable in the latter state by original process from a Federal court."

At page 855,

> "It is well settled that a party may waive venue and consent to be sued at any place and in any district, provided, of course, the jurisdictional requisites exist. There is no doubt that diversity of citizenship exists here. Therefore right of action in the federal court exists, and the federal court has jurisdiction. Defendant, when it came into the state of Indiana as a foreign corporation, agreed solemnly that service upon the auditor of the state of Indiana should have the same legal force and validity as if served upon the corporation itself, and it agreed to keep on file with the secretary of state the affidavit of its president and secretary, showing the location of its principal business office and the name of some person there located, for the purpose of accepting service in all suits that might be commenced against it."

And at pages 855-856,

> "To hold that defendant is not suable in Indiana under the circumstances in this case would open the door to fraud on the part of designing and unscrupulous parties who desire to avoid, for purposes best known to themselves, liability to suit in the national courts. Persons so minded could establish a factory in Florida and incorporate in the state of Washington, and do business by contract in the New England and Eastern states, and yet, when a citizen of any state outside of Florida or Washington, attempted to bring suit, he could be challenged, as plaintiff is challenged in this suit, and compelled to go from Maine, if that happened to be the state of his residence, to Washington, a distance of approximately 3,000 miles."

To the same effect are the earlier cases of

United States vs. American Bell Telephone Co., 29 Federal 17;

Consolidated Store Service Company vs. Lamson Consolidated Store Service Company, 41 Federal 833;

United States vs. Southern Pacific Railroad Co., 49 Federal 297.

The decision in this case is based on that part of Section 112 of Chapter 8, O. S. C. A., which reads as follows:

> "But where the jurisdiction is founded **only** on the fact that the action is between citizens of different states, suit shall be brought **only** in the district of the residence of either the plaintiff or the defendant."

We suggest that the use of the word "only" is significant and that Congress had a particular purpose in mind when that word was twice chosen to be used in such a short sentence, and that such word has not been given the careful consideration in some of the decisions which it would seem to deserve. We suggest that the jurisdiction does not depend **only** upon diverse citizenship where a foreign corporation has qualified to do and does conduct a general business in a foreign jurisdiction. If there were nothing in this case except diverse citizenship and the defendant did not do a large part of its business in foreign jurisdictions, then the narrow construction of that part of the statute would no doubt be proper. If the business done by the defendant in a foreign jurisdiction was of an isolated character or purely in interstate commerce, the narrow construction would no doubt be proper; but where a defendant such as we have in this case, an insurance company, does, as most insurance companies do, more business away from home than at home and they are required in foreign jurisdictions to become practically a domestic corporation for all other purposes, it seems only reasonable and just to require them to be a domestic corporation for the purpose of suit.

That the defendant in this case had a right by timely and seasonable objection to raise the question of the jurisdiction of the trial court over his person is not attempted

to be disputed. We insist, however, that such right was lost by delay and that such delay was due entirely to the defendant and not to any other person; that the defendant waived and forfeited its right to stand upon its plea of jurisdiction over its person when without finally adjudicating that question it undertook, successfully or otherwise to contest this case upon the merits in the trial court; that the trial court came to the only conclusion which was right, just and proper under the circumstances and facts connected with and surrounding this case; that the judgment of the trial court should in all respects be affirmed and that the questions certified by the United States Circuit Court of Appeals for the Sixth Circuit should be answered so that that court will enter judgment of affirmance in all respects in this case.

This Court may conclude that a better understanding of the entire situation can be gained from a consideration of the entire record and if that conclusion be reached, we will be glad to file a motion requesting this Court to require the Court of Appeals to certify the entire record, in the event this Court does not desire on its own motion to require the certification of the same.

Respectfully submitted,

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